

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-846

JOHN W. WINGO

Petitioner,

—v.—

CARL JAMES WEDDING

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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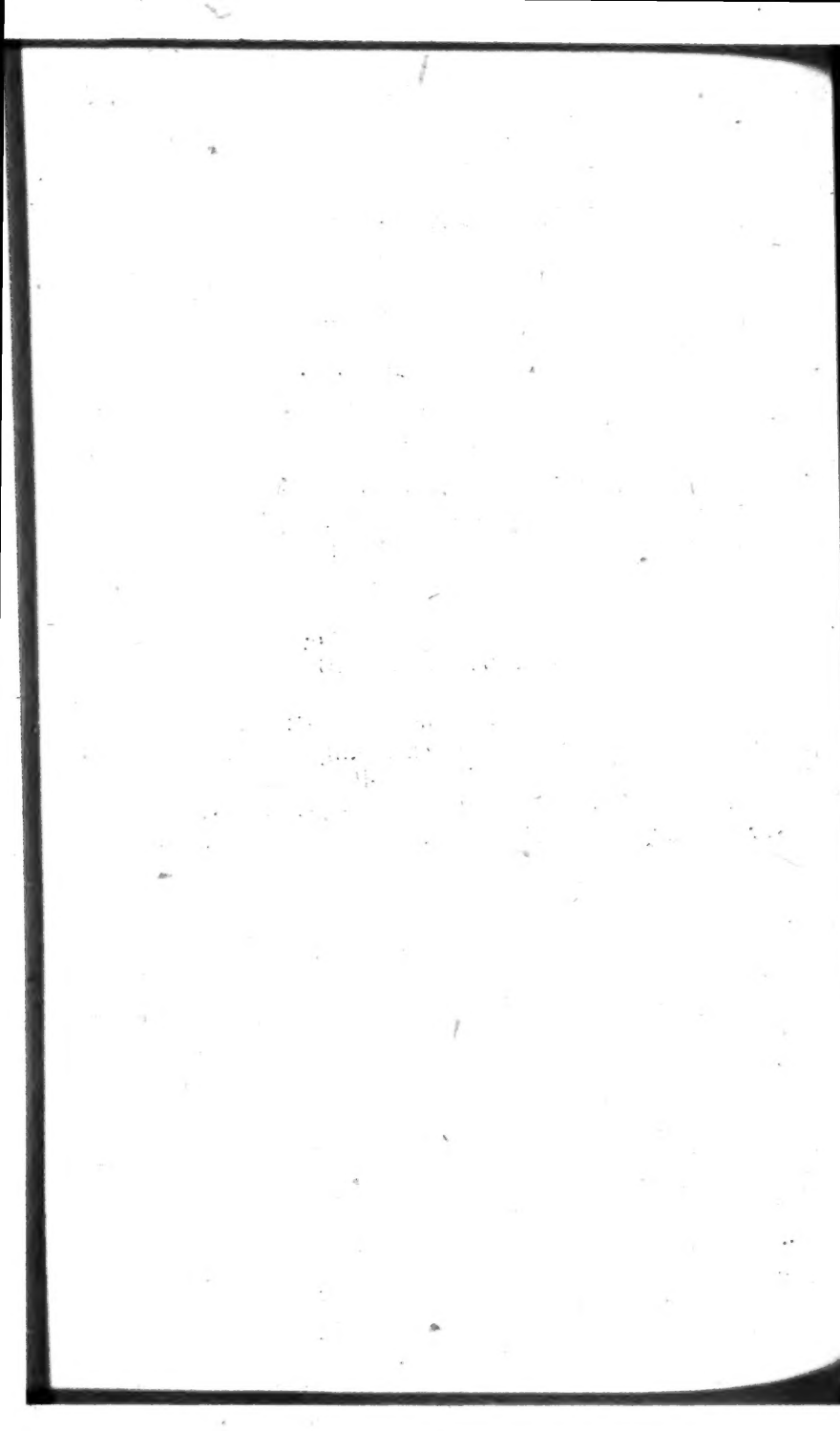
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RELEVANT DOCKET ENTRIES

**UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF KENTUCKY**

Date

1971

Proceedings

- 8-25 Petition for Writ of Habeas Corpus tendered
 Motion for Leave to Proceed Forma
 Pauperis
 Affidavit Forma Pauperis
 Motion for Personal Appearance
 Webster Circuit Court Memorandum
 attached
 Court of Appeals — Opinion of the Court
 by Judge Steinfeld
 Court of Appeals — Rebuttal for Appellant
 Appeal from Webster Circuit Court
 Ct. of Appeals of Ky. Brief of Appellee
- 9-13 Order by Magistrate Booth 9-9-71, petitioner
 granted permission to proceed in forma
 pauperis in this action and petition for
 writ filed without prepayment of fees and
 costs; further that respondent show cause,
 if it exists, why writ should not be granted
 by the filing of a return within three (3)
 days, unless for good cause additional
 time required, in which return shall be
 filed not more than 20 days from the date
 of this order. Copies to Judge Gordon,

Carl James Wedding, John B. Breckinridge, and John W. Wingo.

- 9-13 Petition for Writ filed by order of Court.
- 9-30 Response to Petition for Habeas Corpus and Motion to Dismiss w/Memorandum in Support of Motion to Dismiss.
- 10-18 Rebuttal Writ of Habeas Corpus
- 10-29 ORDER: petition dismissed. Cys to petitioner, Breckinridge and Wingo.
- 11-9 Certificate of Probable Cause
Notice of Appeal tendered
Motion to Proceed in Forma Pauperis w/Affidavit.
- 11-22 ORDER granting Petitioner's request for certificate for probable cause and motion to proceed in forma pauperis. Cys to Carl James Wedding, Breckinridge and Wingo.
- 1972
- 12-27 Mailed record and clerk's certificate to USCA, cy of letter to Wedding and Breckinridge.
- 4-26 Rec. filed from USCA, Adjudged, "that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded. No costs awarded inasmuch as this appeal is in Forma Pauperis." Cys. to Carl James Wedding and the Attorney General.

- 5-8 ORDER entered by Dale R. Booth, US Magistrate, setting evidentiary hearing before U. S. Magistrate in Room 413, U.S. Courthouse, Louisville, Ky., commencing 9:30 a.m. on June 7, 1972, on issues raised in petition. Hon. Joseph G. Glass appointed counsel for petitioner. Cys. to Carl James Wedding, Petitioner; Ed W. Hancock, Atty. General; Warden, Ky. State Penitentiary; Hon. Joseph G. Glass & U. S. Marshal.
- 5-17 Motion to disqualify Magistrate from Holding Habeas Corpus Evidentiary Hearing filed by Petitioner.
- 5-17 Memorandum filed in support of Motion.
- 5-30 Order entered 5-31-72; petitioner having filed motion asking Ct. to disqualify U. S. Magistrate from conducting evidentiary hearing on issues raised by petitioner, & to assign said hearing to a Judge of District Ct., ORDERED, that said Motion be overruled. Cys. to Carl James Wedding, Ed W. Hancock, Joseph G. Glass & John W. Wingo. MNL:dh
- 5-30 Order entered, evidentiary hearing set before U.S. Magistrate commencing at 9:30 A.M. June 7, 1972, is hereby rescheduled for 1:30 p.m., June 26, 1972. Cys. to Wedding, Hancock, Glass, Wingo & U. S. Marshall.
MNL:dh

- 6-13 USM-285 & Civil Subpoena: Faust Y. Simpson on 6-9-72 to appear on 6-26-72; W. Fred Hume, endvr. to serve on 6-9-72; Mr. Hume in poor health & unable to go to L'ville so did not accept advance check for \$51.60 which was ret. to atty.
- 6-19 Entered Order signed by Dale Booth, U.S. Magistrate on 6-15-72 that Marshal is directed to Lodge petitioner in Daviess County Jail not earlier than June 23, 1972 & bring him to the hearing herein. Cys. to Carl James Wedding, Ed W. Hancock, Joseph G. Glass, John W. Wingo & U.S. Marshal.
- 6-28 Order that evidentiary hearing be conducted at Courthouse at 4:30 p.m. June 26, 1972, & U.S. Marshal directed to convey petitioner to hearing above scheduled & return him to Daviess County Jail at conclusion. (Dixon, Ky.)
- 6-30 Order, case came on for evidentiary hearing on 6-26-72, Magistrate would make findings of fact, etc. & transmit same to District Judge. Cys. to Judge Gordon, Wedding, Hancock, Glass & Wingo
- 7-14 USM-285 & Order returned
- 8-30 Entered Order signed by Magistrate Booth on 8-21-72 that respondent within 10 days from entry of this order, file authenticated

copies of all state court proceedings conducted in petitioner's case. Cys. to Joseph G. Glass & Ed W. Hancock.

- 9-8 Letter from Attorney General enclosing copies of State Court proceedings w/exhibit A-f.
- 9-14 Report & Recommendations filed by Magistrate
- 9-14 Findings of Fact & Conclusions of Law filed by Magistrate.
- 9-14 Tendered Order.
- 9-22 Request by Mr. Glass for Ct. to hear testimony;
- 9-27 Memorandum filed by Mr. Glass.
- 10-11 Order signed by Judge Gordon on 10-10-72, Ct. Having considered all pleadings & having read and considered Magistrate's Findings of Fact & Conclusions of Law filed on 9-14-72 & his report & recommendation & upon motion of petitioner having heard recorded testimony of the evidentiary hearing accorded the petitioner; ORDERED that said Findings of Fact & Conclusions of Law filed by the Magistrate be, & they are, adopted & restated by the undersigned as his own Findings of Fact & Conclusions of Law & Petition for Writ of Habeas Corpus is hereby ORDER-

ED DISMISSED. Cys. to Carl James Wedding, Ed W. Hancock, John W. Wingo, Joseph G. Glass & U.S. Magistrate Dale Booth.

- 10-19 MOTION for certificate of probable cause and leave to proceed in forma pauperis filed by petitioner. Order tendered. Notice of appeal tendered.
- 10-24 ORDER signed by Judge Gordon 10-20-72 that Petitioner's Motion issued certificate of probable cause is hereby sustained and that petitioner's motion for leave to proceed in forma pauperis is hereby sustained. Cys. Ed Hancock, Curran Clem, Joe Glass & Judge Booth.
- 10-20 NOTICE OF APPEAL filed by petitioner. Cys. of Notice mailed to: Hancock, Clem, Glass & Booth along with copies of the docket entries.
- 10-25 NOTICE OF APPEAL, from Order entered Oct. 11, 1972, filed by Carl Wedding, Cys. of same to Joseph G. Glass, Ed W. Hancock, Curran Clem & Judge Booth; filed with attachments of motion to proceed in forma pauperis on appeal, motion of probable cause & certified records for Appeal.
- 11-21 Mailed record to USCA; cy. of clerk's certificate, letter to USCA, & cy. of docket

entries sent to Carl James Wedding,
Joseph G. Glass, Ed Hancock, Curran
Clem & John W. Wingo.

* * * * *

Prior Appeal No. 71-2090

DATE	FILINGS—PROCEEDINGS	Filed
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Nov. 30	Certified record (1 vol. of pleadings), filed; and cause docketed
Dec. 5	Motion of Appellant for appointment of counsel (Granted — JWP)
Dec. 5	Motion of Appellant for leave to hear case on original record without ap- pendix (Granted)

Feb.	2	Order appointing counsel for Appellant	W-114
Mar.	14	Four copies of Brief for Appellant	
Mar.	14	Proof of service of brief for Appellant	
Apr.	13	Twenty-five copies of Brief for Appellee	
Apr.	13	Proof of service of brief for Appellee	
Apr.	13	Appearance of counsel for Appellee	
May	11	Motion of Appellee to file supplemental citation (Granted — Phillips, J.)	
May	29	Motion of Appellee to file supplemental citation (Copies distributed to the court)	

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DATE	FILINGS—PROCEEDINGS	Filed
June 11	Cause argued and submitted (Before: Phillips, Weick and Cecil, JJ.)	Y-5
Aug. 31	Judgment of the District Court vacated and the case is remanded with instructions that the Court hold an evidentiary hearing on Petitioner's constitutional claims	Z-5
Aug. 31	Opinion by Weick, J.	
Sep. 17	Motion for stay of mandate	
Sep. 17	Letter from counsel for Appellee requesting preparation of record for Supreme Court	
Sep. 18	Certified record for certiorari, including original record, mailed to Supreme Court	
Sep. 26	Order staying mandate thirty days (Weick, J.)	Z-7
Oct. 26	Motion for extension of time for stay of mandate (Motion granted — Weick, J.)	
Dec. 3	Notice of filing petition for certiorari on 11/30/73 (Sup. Ct. 73-846)	

GENERAL DOCKET**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

DATE	FILINGS—PROCEEDINGS	Filed
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1974

Jan. 29	Certified copy of order of Supreme Court granting certiorari on 1/21/74	
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No. 71-2090

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL JAMES WEDDING,

Petitioner,

v.

JOHN W. WINGO, WARDEN KENTUCKY
STATE PENITENTIARY,

Respondent.

Appeal from the United States District Court
for the Western District of Kentucky.

Decided and Filed March 16, 1972.

Before PHILLIPS, Chief Judge, and WEICK and
MILLER, Circuit Judges.

PER CURIAM. Wedding appeals from the dismissal of
his petition for writ of habeas corpus without an evidenti-
ary hearing.

He is serving a life sentence imposed in 1949 by
the Webster Circuit Court in Kentucky after a plea
of guilty to murder. He asserts among other things
that his counsel was not appointed until the day of
the trial; that he was not advised of his right of trial

by jury; and that his guilty plea was coerced by threat of a possible death sentence.

The record disclosed that Wedding filed a post conviction proceeding under R.Cr. 11.42 in the State courts of Kentucky, which was dismissed without an evidentiary hearing. The Kentucky Court of Appeals affirmed in an opinion rendered June 11, 1971, *Wedding v. Commonwealth*, 468 S.W.2d 273.

We conclude that the petition for habeas corpus presents issues of fact requiring an evidentiary hearing. *Townsend v. Sain*, 372 U.S. 293, *Yates v. Wingo*, 425 F.2d 1167 (6th Cir. 1970).

Reversed and remanded.

* * * * *

Entered May 8, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,

Commonwealth of Kentucky, et al,

Respondents

CIVIL ACTION NO. 2591-G

ORDER

By order entered October 27, 1971, the petitioner's petition for writ of habeas corpus was dismissed. By its opinion filed March 16, 1972, and issued as mandate April 24, 1972, the United States Court of Appeals for the Sixth Circuit (#71-2090) reversed and remanded the case for an evidentiary hearing on the basis that "The petition for habeas corpus presents issues of fact requiring an evidentiary hearing."

Accordingly an evidentiary hearing is hereby ordered to be conducted before the United States Magistrate in Room 413, United States Courthouse, Louisville, Kentucky, commencing at 9:30 a.m. on June 7, 1972, on the issues raised in the petition.

The United States Marshal is directed to cause the petitioner to be brought from his present place of incarceration in the custody of Warden of the Kentucky State Penitentiary, Eddyville, Kentucky, and

to be lodged in the Louisville City Jail on a date not later than May 31, 1972, in order that he may have opportunity to consult with his counsel and to be brought to the hearing herein ordered.

The Honorable Joseph G. Glass is appointed as counsel for the petitioner.

May 4, 1972

/s/ Dales R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:

Carl James Wedding, Petitioner
Ed W. Hancock, Attorney General,
Commonwealth of Kentucky
Warden, Kentucky State Penitentiary
Honorable Joseph G. Glass
United States Marshal

A Copy: Attest
August Winkenhof, Jr., Clerk
By /s/ W. Hatcher
Deputy Clerk

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden
Commonwealth of Kentucky, et al, Respondents

CIVIL ACTION NO. 2591-G

**MOTION TO DISQUALIFY MAGISTRATE
FROM HOLDING HABEAS CORPUS
EVIDENTIARY HEARING**

Comes the Petitioner, Carl James Wedding, by counsel, and respectfully moves this Court to enter an Order disqualifying the Hon. Dale R. Booth, United States Magistrate, from holding the evidentiary hearing in the matter herein, and assigning the hearing before a district judge of the United States District Court for the Western District of Kentucky.

By Order, entered May 4, 1972, an evidentiary hearing is scheduled for June 7, 1972, at 9:30 a.m. before the United States Magistrate.

It is the Petitioner's contention and belief that the Federal Magistrate's Act, 28 U.S.C. §631, et seq, does not empower a United States Magistrate to hold such evidentiary hearings.

In support of petitioner's Motion, he attaches

herewith his Memorandum of Law concerning the issue.

Respectfully submitted,

/s/ Joseph G. Glass
JOSEPH G. GLASS
Counsel for Petitioner
100 North Sixth Street, Suite 504
Louisville, Kentucky 40202
584-7288

I hereby certify that a copy of the foregoing Motion was mailed, postage prepaid, to the Hon. Dale R. Booth, United States Magistrate, Federal Building, Louisville, Kentucky; the Hon. Ed W. Hancock, Attorney General, State Capitol Building, Frankfort, Kentucky, on this 16th day of May, 1972.

/s/ Joseph G. Glass
JOSEPH G. GLASS

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden

Commonwealth of Kentucky, et al,

Respondents

CIVIL ACTION NO. 2591-G

**MEMORANDUM OF LAW IN SUPPORT OF
PETITIONER'S MOTION TO DISQUALIFY
UNITED STATES MAGISTRATE FROM
HOLDING HABEAS CORPUS
EVIDENTIARY HEARING**

The *Federal Magistrate's Act*, (hereinafter referred to as The Act) 28 U.S.C. §631, et seq, created the position of United States Magistrate (hereinafter referred to as Magistrate) by appointment of the Court, in the various judicial districts. The jurisdiction and powers of the Magistrate are set forth in 28 U.S.C. §636, and are set forth as follows:

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment —

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, impose conditions of release under section 3146 of title 18, and take acknowledgements, affidavits, and depositions; and

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section.

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or, where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to —

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

(c) The practice and procedure for the trial of cases before officers serving under this chapter, and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 3402 of title 18, United States Code.

(d) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court, would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed be-

fore a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

With regard to the Act itself, the petitioner calls the Court's attention to three (3) particular subsections of 28 U.S.C. §636. Those being:

(a) Each United States magistrate serving under this chapter shall have within the territorial jurisdiction prescribed by his appointment —

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts; . . .

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of this section.

(b) . . . The additional duties authorized by rule may include, but are not restricted to —

(3) *preliminary review* of applications for post-trial relief made by individuals convicted of criminal offenses, *and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.* (Emphasis added).

In *Holiday v. Johnston*, 313 U.S. 342, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941), the Supreme Court held that a United States Commissioner was without authority to hold evidentiary hearings on federal habeas corpus petitions. In its opinion the Court reasoned, at page 352. that:

One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts.

The court then went on to hold, at pages 353-354, that:

The District Judge should *himself* have heard the prisoner's testimony and, in light of it and other testimony, *himself* have found the facts and based *his* disposition of the cause upon *his* findings (Emphasis added).

Last year, the United States Court of Appeals for the Sixth Circuit, utilizing the above language from *Holiday*, *supra* reversed a decision of this Court where a Special Master (actually the duly appointed United States Commissioner) had been appointed to hold an evidentiary hearing on a federal habeas corpus petition. *Payne v. Wingo*, 422 F.2d 1192 (1971). This case was later followed by *Green v. United States*, 445 F.2d 847 (6th Cir., 1971).

In *Payne*, *supra*, the Court went on to discuss that the Federal Rules of Civil Procedure "provide no authority for the delegation of the conduct of a habeas corpus evidentiary hearing to a Special Master." (p. 1194). Moreover, the Court considered the tremendous

case load of the district courts, and on that point stated, at page 1194.

... Nevertheless we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. ~~Without~~ a clear mandate from Congress, we cannot presume that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary.

It is noteworthy to observe that *Holiday*, *supra*, was decided on the basis of 28 U.S.C. §457, 458 and 461, and principally upon §461. Those sections were incorporated within 28 U.S.C. §2243 enacted June 25, 1948. (*Holiday*, *supra*, and Reviser's note: 28 U.S.C.A. §2243).

Further, in *Payne*, *supra*, at page 1194, the Court discussed 28 U.S.C. §461 and its successor 28 U.S.C. §2243 with regard to the terms *the court, or justice, or judge*. Again, at page 1194, the Court stated:

... Although the statute interpreted in *Holiday* authorized 'the court, or justice or judge' to determine the facts, and the current provision merely refers to 'the court,' we do not find the difference significant. The Supreme Court in *Holiday* essentially held that the phrase 'court, or justice, or judge' in 28 U.S.C. § 461 referred to a federal judge rather than a commissioner. Since these words were phrased in the alternative in that statute, the Supreme Court in *Holiday* found that the 'court' was the equivalent of the word 'judge' for purposes of 28 U.S.C. § 461. When Congress retained the reference to the 'court' in

the new statute, it must have meant to retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of Holiday by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.

18 U.S.C. §3401, discussed in the jurisdiction and powers section of the Act (§ 636) does not discuss civil proceedings in any form.

Remaining, then, is subsection (b)(3) of the Act which discusses additional duties of the magistrate. Petitioner urges that the language of that subsection is clear and concise and should be interpreted literally, this is,

... The additional duties authorized by rules may include. .

(3) *preliminary review* of applications for post-trial relief made by individuals convicted of criminal offenses, *and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing* (Emphasis added).

The legislative history of the Act is somewhat instructive on the issue in question, in that it does not mention discussion of any provision for allowing magistrates the authority for holding evidentiary hearings on habeas corpus hearings. In point of fact, under the provision *Purpose of Legislation*, Vol. 3, 1968, U.S. Code Congressional and Administrative News, p. 4254, it is stated that:

In summary, § 945 is intended both to update and make more effective a system that has not been altered basically for over a century, and to cull from the evergrowing workload of the U.S. district courts matters that are desirably performed by a *lower tier* of judicial officers (Emphasis added).

Petitioner believes also it is important to note that the "Great Writ" as the Writ of Habeas Corpus has been described is rooted deep in the common law and held to be "a precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired." *Bowen v. Johnson*, 306 U.S. 19, 59 S.Ct. 442, 83 L.Ed. 455 (1939); *Darr v. Burford*, 339 U.S. 200, 70 S.Ct. 587, 94 L.Ed. 761 (1956). It's origins are deep in English history and "it was brought to America by the colonists, and claimed as among the immemorial rights descended to them from their ancestors" *Ex Parte Yerger*, 8 Wall, (75 U.S.) 85, 95, 19 L.Ed. 332.

Payne, supra, specifically applied itself to Commissioners and Special Masters and apparently reserved the question as it applies to magistrates (Footnote 1, p. 1193). The petitioner is not unmindful of a recent decision of the United States Court of Appeals for the Fifth Circuit, as yet unreported, wherein that Circuit held, more by inference than by direct language, that an evidentiary hearing before a magistrate is permissible where the district court, "upon his own independent examination of the record" denied the writ (*Johnson v. Wainwright*, No. 71-3103, February 25, 1972). There was no other discussion of the issues in the opinion. The facts of the

issue are basically the same as in *Payne*, supra, except a magistrate heard the evidence rather than a special master.

However, in *Rainha v. Cassidy*, 454 F.2d 207, January 13, 1972, the United States Court of Appeals for the First Circuit took issue with the district court's procedure of allowing a magistrate to hold an evidentiary hearing in a habeas corpus matter. At pages 207-208, the Court states:

The court denied the stay without hearing the parties, relying on a magistrate's report of findings and recommendations based upon an evidentiary hearing before the magistrate. Petitioner appeals.

We are troubled at the outset by this procedure. A magistrate has authority to do certain limited things, and to perform such further duties 'as are not inconsistent with the Constitution and laws of the United States,' as may be determined by the particular district court. 28 U.S.C. § 636(b). As a statutory example, we quote subsection (3).

'(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

While the present case involves a habeas corpus proceeding of a different character, the thought that the magistrate, rather than recommending a hearing after a preliminary re-

view, could be empowered to conduct the evidentiary hearing himself and make findings of fact, to be approved by a pro forma laying on of hands by the district court without notice, does not appeal to us in the least.

We do not pursue this matter in the present case because a close questioning of counsel by the single judge of this court to whom a hearing on the application for stay was referred, discloses that in fact petitioner admitted the correctness of certain of respondent's testimony which we regard as foreclosing any possibility of success on petitioner's part.

CONCLUSION

The petitioner urges that the applicable law on this question is still as recited in *Holiday*, supra, and *Payne*, supra, and that the enactment of the *Federal Magistrates Act* has not altered its meaning in any way. The district judge except in special circumstances involving direct habeas corpus applications to Circuit Judges and the Supreme Court Justices is the person who has authority, by law, to hold evidentiary hearings on Petitions for Writ of Habeas Corpus.

WHEREFORE, the petitioner prays that this Court will enter an Order assigning this matter to be heard before a judge of the United States District Court for the Western District of Kentucky.

Respectfully submitted,

/s/ Joseph G. Glass

JOSEPH G. GLASS

Counsel for Petitioner

100 North Sixth Street, Suite 504

Louisville, Kentucky 40202

584-7288

I hereby certify that a copy of the foregoing Memorandum of Law was mailed, postage prepaid to the Hon. Dale R. Booth, U. S. Magistrate, Federal Building, Louisville, Kentucky 40202, and the Hon. Ed W. Hancock, Attorney General, State Capitol Building, Frankfort, Kentucky 40601, on this 16th day of May, 1972.

/s/ Joseph G. Glass

JOSEPH G. GLASS

* * * * *

Entered May 31, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary, Respondent

CIVIL ACTION NO. 2591-G

O R D E R

Petitioner having filed a motion, supported by a Memorandum of Law, asking the court to disqualify the United States Magistrate from conducting the evidentiary hearing on the issues raised by petitioner, and to assign said hearing to a judge of the district court, the court having considered same, and being duly advised in all particulars, it is hereby **ORDERED** that said motion be, and it is hereby, overruled.

Date: 5/30/72

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:

Carl James Wedding, Petitioner

Ed W. Hancock, Attorney General,
Commonwealth of Kentucky

Honorable Joseph G. Glass
100 North Sixth Street

Burdorf Building
Louisville, Kentucky 40202

Attorney for Petitioner

John W. Wingo, Warden,
Kentucky State Penitentiary



Entered May 31, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
CARL JAMES WEDDING, Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary Respondent

CIVIL ACTION NO. 2591-G

O R D E R

The evidentiary hearing set before the United States Magistrate commencing at 9:30 A.M., June 7, 1972, is hereby rescheduled for 1:30 P.M., June 26, 1972.

Date: May 31, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:

Carl James Wedding, Petitioner

Ed W. Hancocks, Attorney General,
Commonwealth of Kentucky

Honorable Joseph G. Glass

100 North Sixth Street
Burdorf Building
Louisville, Kentucky 40202
Attorney for Petitioner

John W. Wingo, Warden,
Kentucky State Penitentiary
United States Marshal



Entered June 16, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

ORDER

The order entered May 1, 1972, amending by adding to paragraph (c)(3) of Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby rescinded.

Effective immediately, Rule 16, Rules of the United States District Court for the Western District of Kentucky, is hereby amended by adding to paragraph (c)(3) as follows:

"In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the

proper District Judge. Upon written request of either party, filed with ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it de novo consideration."

Date: June 16, 1972

/s/ James F. Gordon
James F. Gordon, Chief Judge
United States District Court

/s/ Rhodes Bratcher
Rhodes Bratcher, Judge
United States District Court

/s/ Charles M. Allen
Charles M. Allen, Judge
United States District Court

/s/ Mac Swinford
Mac Swinford, Judge
United States District Court

* * * * *

Entered June 28, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

O R D E R

The respondent having moved that the evidentiary hearing ordered in this case be held at the Courthouse in Dixon, Kentucky, and the petitioner through counsel concurring in such motion,

It is hereby ORDERED that the said evidentiary hearing be conducted at the Courthouse at 4:30 p.m. June 26, 1972, and the United States Marshal is directed to convey the petitioner to the hearing above scheduled and to return him to the Daviess County Jail at the conclusion thereof.

June 26, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:

U. S. Marshal's Office

Honorable Joseph G. Glass

100 North Sixth Street

Burdorf Building

Louisville, Kentucky 40202

Attorney for Petitioner

Mr. Curran Clem, Assistant Attorney General,

Commonwealth of Kentucky

Capitol Building

Frankfort, Kentucky 40601

* * * * *

Entered June 30, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

O R D E R

This case came on for an evidentiary hearing ordered by mandate of the Sixth Circuit. The hearing was conducted by the magistrate and commenced at 4:40 P.M., June 26, 1972, at the Courthouse, Dixon, Kentucky, having been set there at the request of counsel for respondent, concurred in by counsel for petitioner, and approved by the acting chief judge of this district.

The petitioner appeared in person and by appointed counsel, Honorable Joseph G. Glass. Respondent was represented by Honorable Curran Clem and Honorable James Ringo, Assistant Attorneys General, Commonwealth of Kentucky.

Petitioner testified and rested his case. W. Fred Hume was called as a witness for the respondent, was sworn and testified, and the respondent rested. All

testimony was recorded on electronic sound recording equipment.

Thereupon, the parties were advised that the magistrate would take the testimony under consideration, make findings of fact and conclusion of law and transmit them to the district judge to whom the case has been assigned. The parties were further advised that upon transmittal, each would be provided a copy thereof, and that within ten days of such date, either party could request that the district judge hear the recorded testimony and give it de novo consideration in determining the disposition of the petition.

The United States Marshal was directed to return the petitioner to the custody of the respondent pending final determination.

Date: June 30, 1972

/s/Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:

James F. Gordon, Chief Judge,
Western District of Kentucky

Carl James Wedding, Petitioner

Ed W. Hancock, Attorney General,

Commonwealth of Kentucky

John W. Wingo, Warden,
Kentucky State Penitentiary

Honorable Joseph G. Glass,
Sixth and Main Streets
Burdorf Building
Louisville, Kentucky 40202

* * * * *

Entered August 30, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

O R D E R

It is hereby ORDERED that the respondent, within ten (10) days from the entry of this order, file authenticated copies of all state court proceedings conducted in petitioner's case.

August 21, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:

Mr. Joseph G. Glass, Attorney for Petitioner
6th & Main Street
Burdorf Building
Louisville, Kentucky 40202

Ed W. Hancock, Attorney General,
Commonwealth of Kentucky

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

REPORT AND RECOMMENDATION

Pursuant to Rule 16, as amended June 16, 1972, of the Rules of the United States District Court for the Western District of Kentucky, transmitted herewith is the report of the evidentiary hearing in this case with my Findings of Fact and Conclusions of Law.

It is my recommendation to the Honorable James F. Gordon, Chief Judge, that if neither party within ten (10) days from this date requests de novo consideration of the recording of the evidentiary hearing that an order be entered adopting as his own, these findings and conclusions (*Parnell v. Wainwright*, No. 72-1649, 5th Cir. decided July 20, 1972), and denying the petitioner's petition for writ of habeas corpus.

Date: September 14, 1972

/s/ Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:

Judge James F. Gordon

Joseph G. Glass, Counsel for Petitioner

Curran Clem, Assistant Attorney General,
Commonwealth of Kentucky

* * * * *

Filed September 14, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

The petitioner, Carl James Wedding, was permitted to file in forma pauperis a verified petition for writ of habeas corpus. The Court dismissed his petition on October 27, 1971, without granting him a hearing, and petitioner appealed. The Court of Appeals, Sixth Circuit, reversed, and by mandate dated March 16, 1972, remanded for an evidentiary hearing, holding that petitioner's assertions that counsel was appointed

the same day of trial, that he was not advised of his right to a jury trial, and that his guilty plea was coerced by threat of a possible death sentence, were issues of fact requiring such a hearing.

Pursuant to Rule 16, as amended, Rules of the United States District Court for the Western District of Kentucky, extract of which is attached, the full-time United States Magistrate for this district, held an evidentiary hearing on June 26, 1972. Petitioner's objection that the Magistrate lacked the authority to conduct the hearing was overruled by the District Judge. The petitioner appeared in person at the hearing represented by court appointed counsel, Honorable Joseph G. Glass, and the respondent was represented by the Honorable Curran Clem and the Honorable James Ringo, Assistant Attorneys General, Commonwealth of Kentucky. The petitioner testified and rested his case. The respondent presented the testimony of the Honorable W. Fred Hume, a member of the Webster County bar, and rested. All testimony was recorded by an Edison Voicewriter, and the discs containing the recorded testimony are filed with the records of the case.

The petitioner alleges that he is currently serving a sentence of life imprisonment imposed upon him in the Webster Circuit Court on April 25, 1949, following his plea of guilty to wilfull murder. At page 3 the petition alleges that counsel consulted with petitioner only ten minutes prior to trial. At page 4 it is alleged that counsel was appointed ten minutes prior to trial. He alleged on page 7 that he was coerced into entering

an involuntary plea of guilty without alleging any specifics. At page 8 he states he was tricked and coerced by the prosecuting attorney and that his "ineffective" counsel advised him to enter a plea of guilty. At page 2 he alleged that he was not advised of his rights to a jury trial where he could have received a two-year sentence for voluntary manslaughter.

At the evidentiary hearing petitioner testified that he was 'locked up' on March 27, 1949, and that he did not see an attorney until April 25, the day he was tried, convicted, and taken to the penitentiary, and that Mr. Cass Walker was appointed to defend him about ten minutes before trial. He testified that he did not think Mr. Hume was one of his counsel, at least he saw no one other than Mr. Walker. He testified that he tried to get Mr. Walker to "lay it over" because he wanted to go to trial, but that Mr. Walker was unable to accomplish this. He responded in the negative when asked if he was advised of his right to a jury trial or if he was aware that he had such a right. He testified that he appeared in court on one occasion only and that was when he entered his plea. Under cross examination he testified that he knew he had a right to a trial, but that was not what his attorney told him. He later explained in his testimony that he had hoped for a continuance so that his attorney could get better prepared and if he had gone to trial he probably would not have received over two years. But, he felt that he had to do what his attorney said.

Petitioner testified with regard to his plea that he pleaded guilty because his attorney told him it was

either that or the death penalty. Petitioner offered no testimony as to any threat from the Commonwealth's attorney. On the contrary, he testified that he didn't believe Mr. Walker had any discussions with the Commonwealth's attorney.

Mr. W. Fred Hume testified that he has been practicing law in Providence since 1932. He stated that on arraignment day, the 14th of April, Judge Marvin Blackwell appointed him and Cass Walker to represent the petitioner, and he, Cass Walker, petitioner, and petitioner's father went into the Judge's chambers and discussed the case. Mr. Walker, who was from petitioner's home town and knew the family quite well, did most of the talking, and most of it was with petitioner's father. At this meeting it was agreed that Walker would get the case, which had already been set for trial, continued for a week or ten days, and that petitioner's father would get one hundred dollars to give to Walker. The case was continued for a week or so, and on the day of the trial, April 25, the four again met together, Walker got the one hundred dollars and they discussed the case some more. On each occasion petitioner was rather uncommunicative and Hume was not sure whether this was because petitioner did not remember much about the incident or whether the father did most of the talking in order to shield his son. Petitioner and his uncle had argued over a "jug of whiskey", the uncle was killed and petitioner did not remember anything in particular about the incident. There were no witnesses to be found. Walker advised them that under the circum-

stances of the case and the lack of a defense, he should plead guilty because of the possibility of the death sentence, and the father agreed that this was best. Petitioner did not voice any opposition and they went into the courtroom where petitioner personally entered his plea of guilty. Walker was well acquainted with the family and was probably aware of petitioner's record. He further testified that Walker handled most of the case, that they could not offer any defense, that petitioner was well aware of his right to a trial on the issues by jury, but that under the circumstances a plea of guilty was the best course of action.

Subsequent to the hearing the respondent was ordered to file the available state court records, and he has now filed a copy of the indictment, order of indictment, arraignment order, three defendant and one Commonwealth subpoenas, order of continuance, jury instructions and trial order. These exhibits establish the sequence of the defendant's case. He was indicted April 5, 1949, and upon arraignment on April 6 entered a plea of not guilty, and trial was set for April 13. On April 6, eleven witnesses were subpoenaed to testify on behalf of the defendant and four on behalf of the Commonwealth. When the case was called on April 13, the court found that the defendant was unable to and had not employed counsel.⁸ Attorneys C. L. Walker and W. Fred Hume were appointed to defend petitioner and on motion of the defendant the trial was reset for April 25. On April 25 petitioner was permitted to withdraw his plea of not guilty, and

to enter a plea of guilty and was sentenced to a life term.

Other records in the case file reveal that petitioner was sentenced to five years in 1931 for robbery and again in 1935 he received a two-year sentence for pandering.

Whatever dispute may have existed as a result of the conflicting testimony of petitioner and Hume, it is, with one exception, completely resolved by the state records. They show, as Mr. Hume testified, that he and Walker were appointed to represent petitioner, not just Walker as petitioner testified. They further show that they were appointed twelve (12) days prior to trial, as Hume testified to, not the twenty minutes testified to and alleged by petitioner. They further show that petitioner made three court appearances, rather than only on one occasion, as testified to by the petitioner. They show further that the case was originally set for April 13 and continued on defense motion to April 25 as testified to by Hume, and contrary to petitioner's testimony. In short, as to each of these issues, not only has petitioner's testimony been contradicted by Hume's testimony as to his recollection of the events, but Hume's testimony has been corroborated by the state court records.

This leaves in issue only the number and length of the consultations between petitioner and his counsel, the gist of those conversations and the manner in which they may have caused petitioner to enter a plea of guilty. Obviously the state records cannot shed

any light in this regard. It is, however, of utmost significance that where the records could corroborate, they supported Hume in every instance rather than the assertions of petitioner. They clearly show that Hume's recollections of the events of twenty-two years ago were correct and that petitioner's were incorrect. Thus, it is clear that Hume's memory withstood the test of time and his veracity has been established, and petitioner's have not. This, I believe, completely destroys petitioner's credibility. It is therefor more reasonable to believe Hume's testimony that petitioner's counsel did consult with him on two occasions, rather than the ten minutes testified to by petitioner, that petitioner was well aware that the choice of a jury trial was his, as he tacitly admitted, that he was fully aware of the options available to him, and that he chose freely and voluntarily to plead guilty to avoid the probability of conviction and the possibility of a death sentence.

To believe otherwise would fly in the face of reason because not once has the record substantiated a significant allegation made by the petitioner.

Therefor, I find upon examination of all pleadings, exhibits, state records, and the evidence at the evidentiary hearing afforded petitioner that:

a. Attorneys Cass L. Walker and W. Fred Hume were appointed to represent the petitioner twelve days before he entered his plea of guilty to the charge of wilfull murder;

b. Attorneys Cass L. Walker and W. Fred Hume consulted with petitioner concerning his case on two occasions prior to the entry of said plea of guilty;

c. Petitioner had the effective advice and assistance of competent counsel from the time of their appointment to and including the entry of the plea and imposition of sentence;

d. Petitioner was informed of and fully aware that he could enter a plea of not guilty and receive a trial by jury on the issues;

e. Petitioner knowingly, voluntarily and of his free volition waived that right and entered a plea of guilty to the charge;

f. No coercion, unlawful influence or inducement was used or exerted against him by his attorneys or the Commonwealth's attorney to obtain the plea of guilty;

g. Petitioner's apprehension of the death penalty did not render his plea involuntary, his plea being motivated because of his desire to eliminate that distinct possibility in the face of almost certain conviction and his prior felony convictions.

Petitioner bears the burden of in a habeas proceedings to establish a deprivation of constitutional rights. *Humphries v. Green*, 397 F.2d 67 (6th Cir. 1968); *Stock v. Bomar*, 354 F. 2d 200 (6th Cir. 1965). This, he has failed to do. His allegation that counsel was appointed twenty minutes before trial has been shown to be false beyond peradventure of doubt. Also shown to

be false is his denial that Hume represented him and that he, the petitioner, was in court on the charge on one occasion only. Also shown to be false in his denial that no continuance was granted him. The consistent falsity on these material points makes him completely unbelievable on the other pertinent allegations which were contradicted by Hume's testimony but could not be further contradicted by records. Petitioner knew he had a right to a jury trial. He admitted as much. He had been convicted of felonies twice before. He wanted, and got, a continuance to prepare for a jury trial, but changed his mind, in my opinion, because the weakness or lack of a defense made the risk of a death sentence unacceptable to him. If his attorney misjudged the probability of a death sentence, and the correctness of his assessment will forever be conjecture only, that alone, which under the most liberal interpretation to petitioner is a possibility only, would not render his plea involuntary, *Brady v. United States*, 397 U.S. 742 (1969) nor would it establish that his counsel was ineffective. Perfection by counsel is not required. *McMann v. Richardson*, 397 U.S. 759 (1970). It is not improper for an attorney to advise his client of the possible sentences which may be adjudged upon conviction. Indeed, he would be derelict if he failed to do so.

It is my conclusion that petitioner has failed to establish that any constitutionally protected right has been violated. It is my recommendation that the petition be dismissed.

Date: September 14, 1972

/s/Dale R. Booth
DALE R. BOOTH
United States Magistrate

Copies to:

Judge James F. Gordon

Joseph G. Glass, Counsel for Petitioner

Curran Clem, Assistant Attorney General,
Commonwealth of Kentucky

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

R E Q U E S T

Comes the petitioner, CARL JAMES WEDDING,
by counsel, and prays that this Honorable Court will
hear the recorded testimony given at the evidentiary
hearing in the matter herein, and thereafter, consider

this matter de novo, pursuant to Rule 16(c) (3) of the Rules of the United States District Court for the Western District of Kentucky.

Respectfully submitted,

JOSEPH G. GLASS
Counsel for Petitioner
100 North Sixth Street, Suite 504
Louisville, Kentucky 40202
584-7288

I hereby certify that a copy of the foregoing Request was mailed to the Hon. Curran Clem, Assistant Attorney General, Frankfort, Kentucky 40601, on this 22nd day of September, 1972.

JOSEPH G. GLASS

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

M E M O R A N D U M

The petitioner, CARL JAMES WEDDING, on September 22, 1972, filed his request that this Court consider the testimony in this matter de novo pursuant to Rule 16 (c) (3) of the Rules of the United States Court for the Western District of Kentucky.

In support of his request, the petitioner files herewith his Memorandum concerning testimony of the evidentiary hearing held on June 26, 1972, at Dixon, Webster County, Kentucky.

From the testimony received at that hearing, the petitioner can readily understand how a Court might consider the petitioner's credibility concerning discussions with counsel and appearances in Court. However, petitioner urges that a careful examination of the testimony of the Honorable W. Fred Hume, might help clarify some of the Court's misgivings.

It is uncontroverted that the petitioner was continuously incarcerated in the Webster County Jail from approximately March 27, 1949, through April 25, 1949, his day of "trial." There is disputed testimony concerning the consultations which the petitioner had with Court-appointed counsel during the period from indictment, April 6, 1949, to "trial," April 25, 1949. It would appear from the record furnished by the Commonwealth that the petitioner was arraigned, with others, on April 6, 1949. The petitioner has denied this Court appearance, however, for sake of argument it would appear that the petitioner must concede the point in favor of the Court's record. However, even if there was a brief appearance on April 6, it was of little consequence since the matter was merely continued until April 13, 1949, for trial.

On April 13, 1949, by Order, the Circuit Judge appointed the Hon. C. L. Walker and the Hon. W. Fred Hume to represent the petitioner. It is at this point that Mr. Hume's testimony at the June 26, 1972 hearing becomes instructive. Mr. Hume's own recollection of the part that he played in the case indicates that he was simply playing an unimportant role. It is apparent that Attorney Walker controlled the handling of the matter. There apparently was some considerable discussion concerning a retainer fee of One Hundred (\$100.00) Dollars. As a matter of fact Hume acknowledged that Walker talked only with Wedding's father at the first meeting and that Wedding did not participate in any discussions. According to Hume's testimony, Walker proceeded to tell the petitioner

and his father that the petitioner should enter a plea of guilty, because there was the possibility of the petitioner receiving the death penalty. Ironically, in response to a question, Mr. Hume acknowledged that there has never been a death verdict rendered by a Webster County jury. It is conceded that there could always be a first time for such a verdict but apparently based upon past jury performance the chances should have seemed remote.

Hume's description of Wedding included such statements as "... he is not a smart man, he is anything but."; "... why he (Walker) didn't try to get more out of Carl I don't know, but from the answers that I heard, I don't think Carl could have told him anything about what happened."; "Yes, he did talk some, yes but you couldn't make — you couldn't put two and two together from it."

Hume in his testimony indicated in several places that the discussions about the case, such as they were, occurred almost entirely with the petitioner's father, with little or no participation from the petitioner. It would appear that *any* communication that may have been received from the petitioner was either unintelligible or unintelligent. In either event, the petitioner was not an active participant in the case.

The petitioner prays that one very obvious fact will appear from the review of the testimony of the evidentiary hearing i.e., that neither of the attorneys, C. L. Walker or W. Fred Hume, were prepared for a

trial in this case. It does not really matter that they were appointed on April 13, 1949, and the case was continued until April 25, 1949, if they did, nothing in the intervening time for the benefit of their client. The case could have been continued a year, or ten, without benefit to the client if the attorneys did no preparation on their client's behalf.

Carl Wedding was incarcerated in the Webster County jail for thirty (30) days before his "trial" date. For twelve (12) of those days he had two Court-appointed attorneys, and yet neither went to see him at the jail. The only two times the attorneys saw Wedding was when he was brought to the Courthouse, and then only briefly.

Does it really matter in this case whether the conferences were for ten minutes or thirty minutes? It would matter if the argument involved the difference between ten minutes and six hours. Thirty minutes, more or less, is just no time at all to evaluate a case of a man charged with murder.

Of equal importance is the fact that Wedding's attorneys did not really do him any legal favors. It is true that the death penalty was possible for the crime charged. But it was also true, and apparently still is, that such a penalty would not be imposed by any Webster jury. Hume acknowledged this fact at the June 26, 1972, hearing.

If, through plea bargaining, the attorneys had succeeded in securing a greatly reduced sentence in return for a guilty plea then the attorneys would have

been efficient and effective. Even if they had reduced the penalty by one "notch" some argument could be made in their favor. However, this was not the case — for some reason, the attorneys in their efficient and effective way, were able to secure, through plea bargaining, the maximum sentence which had ever been meted out under this same charge.

It just does not seem conceivable that this representation approaches adequate representation. Plea bargaining is now, and was in 1949, an accepted form of practice in Kentucky Courts. It has only been within the last five years or less that the State Circuit Judges have begun to follow a format similar to that practiced in United States District Courts, wherein the Judge has complete control of the sentence. Even so, the plea negotiations are still favored in the Kentucky Courts. In point of fact, it has been recommended, by Memorandum from the Kentucky Attorney General's office, dated December 30, 1971, that plea negotiations be reduced to writing for signature by the parties to the case, i.e., prosecuting attorney, witness, defense counsel and, most importantly, the defendant.

The petitioner believes that when this Court reviews this matter, it will become apparent that the attorneys handling the case in 1949 were simply trying to dispose of an *appointed* case in the most expeditious manner possible. Such actions are not uncommon today.

As the petitioner has pointed out, he received the maximum sentence ever imposed, by court or jury, on his plea of guilty. Certainly a questionable occurrence.

Counsel also knows that it is not possible to second guess what a jury might have done in a given instance. However, reviewing the facts of this case wherein an uncle was killed by a nephew, where both were evidently fighting over a bottle of whiskey, it hardly seems the type of case that would have sent the townspeople to the wailing wall or filled the county with moral indignation. In other words, it would certainly appear at first and second blush, that a more favorable settlement could have been reached if *any* attempt had been made.

The cases are replete that described ineffective assistance of counsel. Counsel knows that the Court is familiar with the theories and believes that a recitation of cases would serve no purpose in this Memorandum.

The Court of Appeals for the Sixth Circuit in *Wedding v. Wingo* (71-2090) discussed the three issues mentioned by the Magistrate in his opinion, i.e., assertions that counsel was not appointed until the day of the trial; that he was not advised of his right of trial by jury; and that his guilty plea was coerced by threat of a possible death sentence.

The petitioner prays that through this Memorandum he has covered these points for this Court. In summary, it does not really matter whether the ten to thirty minutes of conference was spent on one day or two days if a realistic portrayal of the case cannot or is not presented. If there was any consideration of the jury question it would have been by negative inference rather than direct discussion because of the subtleties surrounding the death penalty question.

WHEREFORE, it is prayed that this Court, after a review of the transcription herein, will direct that the Writ of Habeas Corpus issue and thereafter direct the respondent to release the petitioner from his custody.

Respectfully submitted,

/s/ Joseph G. Glass
JOSEPH G. GLASS
Counsel for Petitioner
100 North Sixth Street, Suite 504
Louisville, Kentucky 40202
584-72-88

I hereby certify that a copy of the foregoing Memorandum was mailed postage prepaid to the Hon. Dale R. Booth, U. S. Magistrate, U.S. Courthouse, Post Office, Fourth Floor, Broadway at Sixth Street, Louisville, Kentucky 40201; and the Hon. Curran Clem, and James Ringo, Assistant Attorneys General, State Capitol Building, Frankfort, Kentucky 40601, on this 26th day of September, 1972.

/s/ Joseph G. Glass
JOSEPH G. GLASS

* * * * *

Entered October 11, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

CARL JAMES WEDDING,

Petitioner

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent

CIVIL ACTION NO. 2591-G

O R D E R

The Court having considered all the pleadings in this case and having read and considered the Magistrate's Findings of Fact and Conclusions of Law filed herein on September 14, 1972, and his Report and Recommendation thereon, and upon motion of the petitioner having heard the recorded testimony of the evidentiary hearing accorded the petitioner, and having considered same and given such testimony de novo consideration and being duly advised in all the premises,

It is hereby ORDERED that the said Findings of Fact and Conclusions of law filed by the Magistrate be, and they are, hereby adopted and restated by the undersigned as his own Findings of Fact and Conclusions of Law, and the petition for writ of habeas corpus is hereby ORDERED dismissed.

Date: October 10, 1972

/s/ James F. Gordon
JAMES F. GORDON
 United States District Judge

Copies to:

Carl James Wedding, Petitioner

Ed W. Hancock, Attorney General,
 Commonwealth of Kentucky

John W. Wingo, Warden
 Kentucky State Penitentiary

Honorable Joseph G. Glass
 United States Magistrate

• • • • •

No. 72-2160

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL JAMES WEDDING,
Petitioner-Appellant,

v.

JOHN W. WINGO,
Respondent-Appellee.

APPEAL from United States District Court
for the Western District of Kentucky.

Decided and Filed August 31, 1973.

Before PHILLIPS, Chief Judge, WEICK, Circuit Judge,
and CECIL, Senior Circuit Judge.

WEICK, Circuit Judge. Wedding appeals from the denial by the District Court of his petition for a writ of habeas corpus after an evidentiary hearing conducted by a United States Magistrate. Wedding is presently serving a life sentence imposed in 1949 by the Webster Circuit Court of Kentucky after a plea of guilty to a charge of murder. He had filed his petition for the writ in the District Court in 1971, alleging among other things that his counsel was not appointed until the day of the trial; that he was not advised of his right of trial by jury; and that his guilty plea was coerced by threat of a possible death sentence.

Wedding's petition was denied without a hearing. He appealed to this Court and we reversed and remanded with instructions to conduct an evidentiary hearing on the petitioner's claims of constitutional violation. 456 F.2d 245 (6th Cir. 1972).

Upon remand, a United States Magistrate, acting pursuant to a rule adopted by the District Court, issued an order assigning the evidentiary hearing to himself. Prior to this hearing, however, the petitioner moved to disqualify the Magistrate from holding such hearing on the ground that a Magistrate was not authorized and empowered under authority of the Federal Magistrates Act of 1968 (28 U.S.C. § § 631 to 639 (1973 supp.)) to hold evidentiary hearings. That motion was overruled by the District Court.

The evidentiary hearing was then conducted by the Magistrate on June 26, 1972, at which time an electronic recording was made of the testimony of the witnesses. Thereafter the Magistrate adopted findings of fact and conclusions of law, in writing, ruling that no constitutional right of petitioner had been violated, and recommending that the petition be dismissed. The Magistrate submitted to the Court his findings and conclusions, together with a recording (a plastic phonograph record) of the proceedings.

The petitioner moved to have the Court give the matter de novo consideration. The Court listened to the recording and adopted the findings of fact and conclusions of law of the Magistrate as his own, and dismissed the petition as without merit.

The petitioner has again appealed to this Court, contending that the proceedings of the District Court were invalid because the United States Magistrate had no authority under the Act to conduct an evidentiary hearing on his habeas corpus petition. We agree.

The Federal Magistrates Act of 1968, 28 U.S.C. §§ 631 to 639 (1973 Supp.) provides in relevant part:

"...

(b) Any district court of the United States, by the concurrence of a majority of all the judges of such district court, may establish rules pursuant to which any full-time United States magistrate, or where there is no full-time magistrate reasonably available, any part-time magistrate specially designated by the court, may be assigned within the territorial jurisdiction of such court such additional duties as are not inconsistent with the Constitution and laws of the United States. The additional duties authorized by rule may include, but are not restricted to—

(1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts:

(2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and

(3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate

the decision of the district judge having jurisdiction over the case as to whether there should be a hearing." (28 U.S.C. § 636 (1973 Supp.))

Pursuant to this statute, the Judges of the United States District Court for the Western District of Kentucky signed an Order which amended Rule 16, Rules of that District, by adding to paragraph (c) (3) the following:

"In addition to submitting such other reports and recommendations as may be required concerning petitions for writs of habeas corpus from state prisoners, the full-time Magistrate is directed to schedule and hear evidentiary matters deemed by the Magistrate to be necessary and proper in the determination of each such petition, and to report thereon with an appropriate recommendation for the disposition thereof to the District Judge having jurisdiction of the case. The Magistrate shall cause the testimony of such hearing to be recorded on suitable electronic sound recording equipment. He shall submit his proposed findings of fact and conclusions of law to the proper Judge for his consideration, copies of which shall be provided at that time to the petitioner and respondent, and the Magistrate shall expeditiously transmit the proceedings, including the recording of the testimony, to the proper District Judge. Upon written request of either part, filed within ten days from the date such is so transmitted to the District Judge having jurisdiction thereof, the District Judge shall proceed to hear the recording of the testimony given at the evidentiary hearing and give it do novo consideration."

The interpretation by the rule which the Western District of Kentucky has placed upon the congressional grant of power to United States Magistrates is, in our opinion, incorrect.¹ The Act granted authority to the Magistrate to conduct only a preliminary review of applications for post-trial relief in order to facilitate the decision of the District Court as to whether there should be a hearing. This Court, in its mandate, had already directed that an evidentiary hearing be conducted. This rule of the District Court, quoted above, attempts to expand the jurisdiction of the Magistrate and, as will be pointed out, conflicts with the Act, and is therefore invalid.

Our analysis begins with *Holiday v. Johnson*, 313 U.S. 342 (1941), wherein the Court assessed the respondent's claim that a United States Commissioner (the predecessor of the United States Magistrate) could conduct evidentiary hearings for habeas corpus by virtue of Rule 53(a) and (b) of the Rules of Civil Procedure. The Court stated:

"It is plain, as the respondent concedes, that a commissioner is not a judge and that the command of the court's writ that the petitioner appear before that officer was not a literal com-

1. Because the Magistrates Act of 1968 cannot be interpreted to permit the procedure adopted by the Western District of Kentucky, we need not decide whether it would be permissible constitutionally for Congress to invest power to hold habeas corpus hearings in an official who is outside the pale of Article III of the Constitution. See, however, *TPO, Inc. v. McMillen*, 460 F.2d 348, 352-354 (7th Cir. 1972).

pliance with the statute. The respondent argues, however, that the writ in effect referred the cause to the commissioner as a master whose function was to take the testimony and submit it, together with his findings and conclusions, for such action as the court might take upon such submission. The argument runs that this practice is in substance equivalent to a hearing before the judge in his proper person, has long been followed in the district court in California, has not incurred the criticism of this Court in cases brought here where it was followed, is a convenient procedure, tends to expedite the disposition of such cases, is in accordance with long standing equity practice and is countenanced by Rule 53 (a) (b) of the Rules of Civil Procedure.

"We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of *habeas corpus* in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a person's detention may be disclosed and justice be done. The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself. We cannot say that an appraisal of the truth of the prisoner's oral testimony by a master or commissioner is, in the light of the purpose and object of the proceeding, the equivalent of the judge's own exercise of the function of the trier of the facts." (313 U.S. at 351-352).

By virtue of *Holiday*, the conduct of habeas corpus hearings by United States Commissioners become a dead issue.

Subsequently, however, Congress modified the habeas corpus statute so to provide that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require", rather than "[t]he court, or justice or judge, shall proceed in a summary way to determine the facts of the case . . ." as was formerly provided. 28 U.S.C. § 2243 (1971). (Emphasis added.) The same judicial district involved in this case, the Western District of Kentucky interpreted this modification of the habeas corpus statute as a new authorization by Congress to have officers other than United States Judges, hold habeas corpus evidentiary hearings.

In *Payne v. Wingo*, 442 F.2d 1192 (6th Cir. 1971), we squarely rejected this interpretation. We stated therein:

"When Congress retained the reference to the 'court' in the new statute, it must have meant to retain the meaning that the Supreme Court gave that word in the preceding statute. Assuming, without deciding that Congress could have constitutionally changed the result of *Holiday* by a specific provision in Section 2243, it is evident that Congress chose not to do so. We are not at liberty to disturb that decision.

...

"We realize that our decision in this case does not help alleviate the tremendous and increasing burden which the expanding number of

habeas corpus petitions places on United States District Judges. Nevertheless, we must be ever mindful of the fundamental role that habeas corpus plays in our judicial system. Without a clear mandate from Congress, we cannot presume, that that body would entrust a vital and often conclusive part of habeas corpus to an official, like a Special Master, who lacks the independence and authority of the federal judiciary." (Footnotes omitted) (422 F.2d at 1194-1195).

It is within this context that the interpretation placed upon 28 U.S.C. § 636(b) (1973 Supp.) by the Western District of Kentucky must be analyzed.

The respondent implicitly concedes that authorization for Magistrates to hold evidentiary hearings on habeas corpus petitions is not found in subpart (3) of 28 U.S.C. § 636(b) (1973 Supp.) That section clearly limits the duties of a Magistrate to a review of habeas corpus applications "to facilitate the decision of the district judge having jurisdiction over the case *as to whether there should be a hearing.*" (Emphasis added.) 28 U.S.C. § 636(b)(3) (1973 Supp.) Respondent's construction actually conflicts with the plain language of this subsection.

However, respondent relies upon language immediately preceding subpart (3) of Section 636(b) for authorization of evidentiary hearings by Magistrates. In introducing the explicitly granted powers of United States Magistrates, Congress stated:

"The additional duties authorized by rule [of a judicial district] include, *but are not limited to* — . . ." (Emphasis added) 28 U.S.C. § 636(b) (1973 Supp.).

From this language respondent deduces that Congress invested in extra-judicial officials trial powers which it had for so many years withheld. The inaccuracy of this deduction is manifest.

If Congress intended such a sweeping and far-reaching result certainly it would have indicated this clearly and positively within the body of the Magistrates Act of 1968. Cf., *Buckeye Power, Inc. v. Environmental Protection Agency*, — F.2d — (6th Cir. No. 72-1628, June 28, 1973) Slip Opinion at 9.

More important, such an interpretation runs directly counter to the well-established doctrine of statutory construction denominated *ejusdem generis*. This doctrine directs that a general provision of a statute will be controlled and limited by subsequent statutory language more specific in scope. The Supreme Court in *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-229 (1957), articulated the rule as follows:

"[T]he law is settled that 'However inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208. *MacEvoy Co. v. United States*, 322 U.S. 102, 107."

Therefore, although the Magistrates Act of 1968 provides that Magistrates are "not restricted to" the three powers explicitly outlined in the Act, by virtue of *ejusdem generis* those three powers are exclusive on the topics which they cover. Accordingly, insofar as habeas corpus

is concerned, Magistrates have only power to assist the District Judge in determining "whether there should be a hearing." 28 U.S.C. § 636(b)(3)(1973 Supp.).

The legislative history of Section 636(b) of 28 U.S.C. supports this proposition. The original draft of the subsection in the Senate Bill provided that the Magistrate could give:

"...
(3) preliminary consideration of applications for post-trial relief made by individuals convicted of criminal offenses."

The Judicial Conference of the United States in September, 1966, sent to the Senate a report of its Committee on Criminal Law, which report it had adopted, and which stated as to Section 636(b):

"The Committee is of the opinion that the enumeration of duties in Section 636(b) as now worded presents a delegation which is so broad in scope and so general as to make this subsection vulnerable to possible constitutional attack. . . ." (Hearings on S.3475 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary. 89th Cong., 2d Sess. (1966) at 241n.)

In order to foreclose a broad interpretation of Section 636 (b) (3) which would make it vulnerable to constitutional attack, the original Bill was amended and the phrase, "preliminary consideration of applications for post-trial relief" in the Bill was narrowed to "preliminary review" of the applications and the power and authority of the Magistrate was restricted to "submission of a report and recommendations to facilitate

the decision of the district judge" only as to "whether there should be a hearing." It was in this amended and narrowed form that the Act was passed by Congress.

Contemplating the possibility that this Court might reject its argument that a Magistrate has the power to conduct evidentiary hearings for habeas corpus, the respondent advances a second, alternative argument in support of the proceedings below. In its brief, respondent states:

"In the instant case, the testimony of the evidentiary hearing was electronically sound recorded. This enabled the Federal Judge to hear the testimony and give it *de novo* consideration as the petitioner, in this case, requested.

"The Federal Judge in this case made an independent determination and accepted the proposed findings of fact and conclusions of law of the magistrate as his own. The critical factor is this, the ultimate decision was made by the District Judge, not by the magistrate."

To the extent that the respondent argues that the petitioner was given an evidentiary hearing "before a district judge" because he (the Judge) thereafter listened to a sound recording of the hearing before the Magistrate, we are not persuaded.² With equal propriety it could be argued that any civil case could be

2. It would appear to us that it would take about the same amount of time for the District Judge to listen to the recording as it would require for him to preside at the evidentiary hearing.

heard by a Magistrate and the Judge could later decide the case by listening to the sound recording. The Magistrate would indeed become an Assistant Judge.

Rule 52(a) of the Federal Rules of Civil Procedure provides that a District Judge, sitting without a jury, is to make findings of fact and that these findings are not to be set aside by an appellate court unless they are clearly erroneous. The principle which underlies this rule was expressed by the Supreme Court in *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949), as follows:

"Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who *see* and hear them."
(Emphasis added).

Deference is given to the factual findings of a trial judge because he has seen and observed the *demeanor* of the witnesses, and their "[o]utward manner or comportment." WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1956). Listening to a sound recording of the testimony of a witness does not permit a Judge to see and observe the demeanor of witnesses and make credibility determinations therefrom.

Furthermore, it must be noted that an essential ingredient of a hearing before a Judge without a jury is the opportunity afforded to the Judge for questioning of witnesses. By his questioning of witnesses the Judge can clarify matters of evidence which are unclear; he can rule on objects made by the parties; and in the interest of justice he can make sure that both parties have had a fair hearing. By seeing and hearing the witnesses he will be in a much better position

to make credibility determinations. Needless to say, the District Judge in this case could not ask questions of the sound recording. In our opinion, Wedding had the right to have his case heard by an Article III Judge.

In sum, petitioner did not have a hearing before a District Judge, either in form or in substance, as we ordered in our mandate.

In regard to the entire posture of this case, a recent admonition of this Court should be borne in mind. In *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972), we stated:

"Crowded court calendars may be a problem in the United States District Court for Eastern District of Kentucky. Reference of cases to Magistrates, however, is not the proper solution of the problem. . . . [T]he problem of a crowded docket must not be allowed to close the door to a litigant who has a statutory right of review *by a court*." (Emphasis added). (471 F.2d at 1281).

We vacate the judgment of dismissal and remand the case with instructions that the Court itself hold an evidentiary hearing on petitioner's constitutional claims.³

3. In the Fifth, Second and First Circuits, habeas corpus cases have been referred to Magistrates for an evidentiary hearing, or the practice suggested in a remand of a Selective Service case. *Gonzalez v. Zelker*, ___ F.2d ___ (2d Cir. No. 72-1945, Apr. 17, 1973); *Johnson v. Wainwright*, 456 F.2d 1200 (5th Cir. 1972); *Parnell v. Wainwright*, 464 F.2d 735 (5th Cir. 1972); *United States v. King*, 455 F.2d 345 (1st Cir. 1972). It appears from a reading of the opinions in these cases that no questions as to the legality of reference was raised or passed upon by the Courts.

In so doing, we are impelled to note that the phonographic record of the evidentiary hearing was made a part of the record to this Court, apparently in lieu of a transcript. Such procedure was unauthorized. It renders impossible a review by this Court of the record without listening to the sound recording, and it contravenes Rule 10 of the Federal Rules of Appellate Procedure and Rule 10 of this Court.

Vacated and remanded.

* * * * *

Supreme Court of the United States

No. 73-846

John W. Wingo, Warden,

Petitioner,

v.

Carl James Wedding

ORDER ALLOWING CERTIORARI. Filed January 21 , 19 74.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.